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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. ~~73~~ - 220

PEDRO PEREZ,

Petitioner,

—v.—

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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IN THE

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No. .....

PEDRO PEREZ,

Petitioner,

—v.—

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner, Pedro Perez, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Florida, entered on May 16, 1973, quashing the decision of the District Court of Appeal of the State of Florida, Second District, dated September 15, 1972, which Opinion quashed the Order of the Circuit Court of the Thirteenth Judicial Circuit, dated September 16, 1970, affirming the judgment and sentence of the Criminal Court of Record, in and for Hillsborough County, dated April 25, 1968, which sentenced petitioner to imprisonment for a term of one year for the crime of possession of lottery tickets.

Opinions Below

The Opinion of the District Court of Appeal of Florida, Second District, is reported at 267 So.2d 33, and is set out in the Appendix, *infra*, p. 12a.

The Opinion of the Supreme Court of Florida entered on May 16, 1973, is reported at 277 So.2d 778, and is set out in the Appendix, *infra*, p. 1a.

Jurisdiction

The Opinion of the Supreme Court of Florida was entered on May 16, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Question Presented

Is a felony arrest upon probable cause and consequent seizure of evidence unlawful when made in the arrested person's home in the middle of the night without a warrant when the arresting officers had two or three days to obtain a warrant?

Constitutional and Statutory Provisions Involved

The pertinent provisions of the Fourth and Fourteenth Amendments to the Constitution of the United States of America and the provisions of §901.15(3) Florida Statutes, F.S.A., which reads in material part as follows:

> "When arrest by officer without warrant is lawful.—A peace officer may arrest a person without a warrant when:

(3) He reasonably believes that a felony has been or is being committed and reasonably believes that the person to be arrested has committed or is committing it."

Statement of the Case

At least six police officers went to the petitioner's home at approximately 12:30 A.M. on the morning of March 23, 1967, without an arrest warrant or search warrant (TR 25-31).* All of the lights were out in petitioner's home when the officers arrived. They knocked at the door and petitioner came to the door. Petitioner was then arrested for possession of stolen property upon information received by Detective Napoli of the Tampa Police Department which he had obtained from a confidential informant alleging that petitioner was in possession of a stolen color television set (TR 25-27). The detective had obtained this information two or three days prior to going to petitioner's home on the morning of March 23, 1967. The officers had ample opportunity to obtain either a search warrant or an arrest warrant but obtained neither and apparently had failed in an attempt to obtain a search warrant from the State Attorney's office (TR 30-35).

According to the officers, petitioner invited them into his house. Petitioner testified to the contrary. The officers advised the petitioner that they were going to stay in his home until they searched his entire house (TR 40). Thereafter, the officers searched the dining room and other areas

* "TR—" refers to the transcript of the testimony produced at the hearing on the Motion to Suppress on appeal to the Supreme Court of Florida and now returned to the Clerk of the District Court of Appeal, Second District, Florida.

of the house, and on the dining room table found bolita tickets. The following day, Detective Napoli obtained an arrest warrant and a search warrant for petitioner's home and searched the premises again (TR 38-39).

On October 12, 1967, petitioner was charged by Information in the Criminal Court of Record of Hillsborough County, Florida, charging him with the crime of possession of lottery tickets. Petitioner through his attorney filed motions to suppress the evidence seized and to quash the Information. After hearing testimony, the Court denied the motions.

The case came on for trial on April 25, 1968, and at the conclusion of the trial the jury returned a verdict of guilty and the court sentenced the petitioner to serve one year at hard labor in the Hillsborough County Jail. An oral motion was made for new trial on that same day and the court denied the motion. Thereafter, petitioner appealed to the Circuit Court of the Thirteenth Judicial Circuit of Hillsborough County, Florida, which Court affirmed petitioner's conviction by Order dated September 16, 1970. Petitioner then applied for a Writ of Certiorari to the District Court of Appeal of Florida, Second District, which Court quashed the Order of the Circuit Court by Opinion dated September 15, 1972. Although several points of error were raised in the Court of Appeal, Second District, that Court addressed itself solely to the following point:

> "The question we must determine is whether an officer who has known for two or three days of the circumstances on which he intends to arrest a citizen, but who fails to get an arrest or search warrant, was lawfully in that citizen's home when he saw the lottery tickets which grounded this second charge. If their entry into

the home was unlawful, under the doctrine of *Wong Sun* v. *United States*, 1963, 371 U.S. 471, 83 S. Ct. 407 L. Ed. 2d 441, the tainted evidence should have been suppressed."

The Court then found that Florida Statute 901.15, F.S.A., and the Florida Supreme Court's Opinion in *Falcon* v. *State*, 226 So.2d 399 (Fla. 1969), could not control the legality of the arrest if the seizure of the petitioner's person was unreasonable as proscribed by the United States Constitution. The District Court of Appeal held:

"Our decision rests upon the admitted fact that the officers had ample time to obtain a warrant. There was no showing that Perez was intending to leave. There is, in fact, evidence that the officer tried to get a warrant and was refused by the prosecutor. Certainly a number of magistrates were available over at least two days for the issuance of warrants. Then there is the question of entry into a private dwelling at night time, a circumstance which from the earliest years of our common law was thought to be significant. It is hardly less frightening to be awakened by a policeman than a burglar . . . "

"We simply cannot accept the blanket assertion that probable cause to arrest a person for felony justifies intrusion into his home during the nighttime two or three days after the probable cause arose, at least one day after a warrant was sought unsuccessfully, and in the absence of any single fact showing need for action before the facts could be submitted to a magistrate. If the Fourth Amendment means anything, it must protect citizens against the sort of intrusion shown here."

The State of Florida thereafter petitioned for rehearing which was denied October 17, 1972. The State of Florida then petitioned the Supreme Court of Florida for a Writ of Certiorari alleging that the Opinion of the District Court of Appeal conflicted with the Supreme Court's holding in *Falcon* v. *State,* 226 So.2d 399 (Fla. 1969), which held that the requirements of §901.15, F.S.A., solely control the legality of an arrest without a warrant made in Florida. In his brief on the merits, petitioner requested the Supreme Court of Florida to recede from its holding in *Falcon* that an arrest warrant is not required in order to make a lawful arrest despite the officer having reasonable opportunity to do so.

The Supreme Court of Florida, however, granted the Writ of Certiorari and quashed the decision of the District Court of Appeal of Florida. The Supreme Court held:

> "The District Court of Appeal erred in reversing respondent's conviction and discharging respondent on the ground that the arresting officers had ample time to obtain an arrest warrant and erred in qualifying the language of the statute to exclude arrests in dwelling houses in the nighttime. There is no such exception set out in the statute. The arrest of respondent was lawful pursuant to §901.15(3), Florida Statutes, F.S.A."

Reasons for Granting the Writ

This Court has historically adhered to the proposition that a search or seizure is "unreasonable" unless a warrant authorizes it, barring only exceptions justified by absolute necessity.

It is submitted that the "seizure" of one's person in his home at night is a more frightening experience and an even greater intrusion than search of one's home or possessions. As the Florida District Court of Appeal pointed out: "It is hardly less frightening to be awakened by a policeman than a burglar."

In *Terry* v. *State of Ohio*, 392 U.S. 1 (1968), this Court stated: " . . . the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure. See, e.g., *Katz* v. *United States*, 389 U.S. 347 (1967); *Beck* v. *State of Ohio*, 370 U.S. 89 (1964); *Chapman* v. *United States*, 365 U.S. 610 (1961) . . . " 392 U.S. at 20.

In *Jones* v. *United States*, 357 U.S. 493 (1958), this Court recognized that an arrest of a person in his home at night has serious Constitutional ramifications. In *Jones* the Court answered the Government's argument that federal agents could enter Jones' house to arrest him since they had probable cause to believe that he was guilty of committing a felony by stating:

> "These contentions, if open to the Government here, would confront us with a grave Constitutional question, namely, whether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment." 357 U.S. at 499-500.

In *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), this Court discussed in Part II-D of its opinion the historical

difficulties of its attempts to develop a coherent body of Fourth Amendment law. It was pointed out that this difficulty " . . . has been caused by disagreement over the importance of requiring law enforcement officers to secure warrants." 403 U.S. at 474. This Court recognized that some opinions had taken the position that a magistrate must determine probable cause as a precondition to any search or seizure and that the Fourth Amendment is violated whenever the police might reasonably have obtained a warrant but failed to do so. See, e.g., *Trupiano* v. *U. S.*, 334 U.S. 699 (1948). However, this Court pointed out that some cases have asserted " . . . that a test of reasonableness, applied after the fact of search or seizure when the police attempt to introduce the fruits in evidence, affords ample safeguard for the rights in question, so that '[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable' ". 403 U.S. at 474. See, e.g., *U. S.* v. *Rabinowitz*, 339 U.S. 56 (1950). The majority opinion in *Coolidge* reconciled these views, which substantially pertain to the facts in the instant case, as follows:

> "Both sides to the controversy appeared to recognize a distinction between searches and seizures that take place on a man's property—his home or office—and those carried out elsewhere. It is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances'." 403 U.S. at 474-475.

This Court thereafter promulgated a doctrine of decisive Constitutional importance pertaining to the arrest of a man in his own home:

> "It is clear, then, that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is per se legitimate is in fundamental conflict with the basic principles of Fourth Amendment law that searches and seizures inside a man's house *without warrant* are *per se unreasonable* in the absence of some one of a number of well defined 'exigent circumstances'." 403 U.S. at 477-478 (emphasis supplied).

In other words, this Court found in *Coolidge* that absent exigent circumstances a warrantless arrest of a man in his home would violate the Fourth Amendment to the United States Constitution. That proposition enunciated by this Court is in direct conflict with the holding of the Florida Supreme Court to the effect that compliance with Florida Statute 901.15, F.S.A., would control the propriety of an arrest of a citizen in his home without a warrant. The Supreme Court of Florida in its opinion stated: "The District Court of Appeal erred . . . in qualifying the language of the statute to exclude arrests in dwelling houses in the nighttime. There is no such exception set out in the statute."

In the instant case, there were no exigent circumstances surrounding the arrest of Perez after midnight in his home. The officers were not in "hot pursuit", *Warden* v. *Hayden*, 387 U.S. 294 (1967), nor was there evidence that an attempt to secure a warrant might delay the officers sufficiently to cause the petitioner to escape or to destroy the fruits or evidence of his crime, *Harris* v. *United States*, 331 U.S. 145

(1947); *United States ex rel. Cardaio* v. *Cassles,* 446 F.2d 632 (2d Cir. 1971).

Consequently this Court should grant certiorari to announce that the arrest of petitioner in his home at night without a warrant and absent exigent circumstances violated his rights guaranteed by the Fourth Amendment to the United States Constitution.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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July 1973

Opinion of the Supreme Court of Florida

SUPREME COURT OF FLORIDA

No. 42981

May 16, 1973

STATE OF FLORIDA,

Petitioner,

v.

PEDRO ANTONIO PEREZ,

Respondent.

ROBERTS, Justice.

This cause is before this Court on conflict certiorari granted to review the decision of the District Court of Appeal, Second District, in Perez v. State of Florida, reported at 267 So.2d 33 (Fla. App. 1972) which purportedly conflicts with Falcon v. State, 226 So.2d 399 (Fla. 1969). We have considered the case cited for conflict and have determined that we have jurisdiction pursuant to Florida Constitution, Article V, § 3(b)(3), F.S.A.

Respondent was charged by information with the possession of lottery tickets. Before trial respondent filed a motion to quash and suppress evidence which included lottery tickets seized in his home. This motion was denied and subsequently respondent was found guilty as charged by a jury verdict. His conviction by the Criminal Court of Record was affirmed by the Circuit Court of Hillsborough County which found that there was ample evidence in the record to justify conviction of respondent, that the officers

had probable cause to make an arrest (on another charge) without a warrant and the lottery materials were in plain view of the officers who were engaged in performance of their lawful duties, and that if there was any search, it was incidental to a valid arrest. Upon petition for writ of certiorari to the District Court of Appeal, Second District, the District Court quashed the order of the Circuit Court and remanded the cause with directions that respondent be discharged. The District Court of Appeal determined that where an officer who knew the circumstances on which he intended to arrest the defendant for several days for receiving stolen property waited outside defendant's home until the lights went out and then at nearly midnight, went to his door, knocked on it and placed him under arrest, such arrest was unlawful and lottery tickets seen in defendant's home by police officers who had unlawfully entered same and which formed the basis of the charge on which defendant was convicted should have been suppressed. It is this decision which petitioner seeks this Court to review upon the grounds of conflict certiorari.

Pertinent to the cause presently before us are the following facts. Accompanied by several other police officers, Detective Napoli went to the house of respondent Perez shortly after midnight the night of March 22, 1967. He was prompted to go there by information to the effect that respondent had stolen property that came from a burglary Napoli was investigating, a 23-inch RCA color television. This information was received some two or three days previously from a confidential informer who Napoli had known for several years and who had on previous occasions given very reliable information. Napoli did not obtain an arrest warrant or a search warrant before going to respondent's

house. The officers knocked on the door and identified themselves to respondent and immediately arrested respondent on probable cause telling him he was being arrested for possession of stolen property, to-wit: the RCA television which Napoli could visibly see from the front porch when respondent opened the door.

After having invited the officers into his house, respondent turned on the lights in the living room and dining room. While one of the officers read respondent his constitutional rights, Napoli along with several officers, saw bolita and gambling paraphernalia on the dining room table which was located approximately five feet from the television.

For the purpose of deciding this case, the District Court of Appeal credited the trial court's finding that the officers had probable cause to make the arrest without a warrant, but reversed respondent's conviction upon the admitted fact that the officers had ample time to obtain a warrant and for the additional following reason,

> ". . . We simply cannot accept the blanket assertion that probable cause to arrest a person for felony justifies intrusion into his home during the nighttime two or three days after the probable cause arose, at least one day after a warrant was sought unsuccessfully, and in the absence of any single fact showing need for action before the facts could be submitted to a magistrate. If the Fourth Amendment means anything, it must protect citizens against the sort of intrusion shown here. Should our Supreme Court review this case, we would hope that their expression in Falcon would be limited to exclude arrests in dwelling houses in the nighttime."

By imposing additional requirements to those set out in Chapter 901, Florida Statutes, F.S.A., the instant decision of the District Court is in direct conflict with our holding in Falcon v. State, 226 So.2d 399, wherein appellant contended that the trial court erred in overruling the motion to suppress evidence taken from him without a warrant and cited Carter v. State, Fla. App., 199 So.2d 324, in support of his contention. In Falcon v. State, supra, this Court quoted the following language from the *Carter* opinion.

> "We therefore hold that where an arrest or search is made by an officer without a warrant, the State must be prepared to show, not only the factual existence at such time of probable cause, but also that the officer or officers had no reasonable opportunity to previously apply for and be issued an arrest or search warrant; otherwise the evidence as to the fruits of the search goes out."

and then went on to overrule the doctrine explicated in *Carter*, by stating,

> "To the extent that *Carter* purports to impose requirements other than those set out in Chapter 901, Florida Statutes, F.S.A., for a valid arrest without a warrant, it is erroneous. A similar contention has been rejected by the Federal Courts." [2]

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[2] United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950); Odom v. United States, 403 F.2d 45 (C.C.A. 5th 1968).

This Court thus held that Chapter 901, Florida Statutes, F.S.A., lays down the only requirements for a valid arrest without a warrant.

Section 901.15, Florida Statutes, F.S.A., provides:

"When arrest by officer without warrant is lawful.—A peace officer may arrest a person without a warrant when:

(1) The person has committed a felony or misdemeanor or violated a municipal ordinance in the presence of the officer. Arrest for the commission of a misdemeanor or violation of a municipal ordinance shall be made immediately or in fresh pursuit.

(2) A felony has been committed and he reasonably believes that the person committed it.

(3) He reasonably believes that a felony has been or is being committed and reasonably believes that the person to be arrested has committed or is committing it.

(4) A warrant for the arrest has been issued and is held by another peace officer for execution."

and Section 901.17 provides,

"Method of arrest by officer without warrant.—A peace officer making an arrest without a warrant shall inform the person to be arrested of his authority and the cause of arrest except when the person flees or forcibly resists before the officer has an opportunity to inform him or when giving the information will imperil the arrest."

Applying the principles announced in *Falcon*, the District Court of Appeal, Third District, declared in Reis v. State, 248 So.2d 666 (Fla. App. 1971) cert. den. 252 So.2d 798 (Fla. 1971), that the absence of an arrest warrant does not

necessarily invalidate an arrest based on reasonable grounds to believe that a felony has been committed even though there may have been sufficient time to have obtained an arrest warrant.

In the instant cause, there is no question that the arresting officers had probable cause to make a valid arrest. Probable cause with reference to a warrantless arrest and subsequent search and seizure of defendant's person and his automobile incident to the arrest, was recently discussed by the Supreme Court of the United States in Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972) wherein that court succinctly stated,

> "Probable cause to arrest depends 'upon whether, at the moment the arrest was made . . . the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.' Beck v. Ohio, 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142 (1964). In the present case the policeman found Williams in possession of a gun in precisely the place predicted by the informant. This tended to corroborate the reliability of the informant's further report of narcotics, and together with the surrounding circumstances certainly suggested no lawful explanation for possession of the gun. Probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction. See Draper v. United States, 358 U.S. 307, 311-312, 79 S.Ct. 329, 331-332, 3 L.Ed.2d 327 (1959). Rather, the court will evaluate generally

the circumstances at the time of the arrest to decide if the officer had probable cause for his action:

> 'In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' Brinegar v. United States, 338 U.S. 160, 175, 69 S.Ct. 1302, 1310, 93 L.Ed. 1879 (1949)."

Section 901.15, Florida Statutes, F.S.A., does not say that the arrest thereby authorized cannot be made in the arrested person's home in the nighttime without a warrant if the officer had opportunity to obtain a warrant.

The Supreme Court of the United States has opined that absence of a warrant of arrest, even though there was sufficient time to obtain one, does not destroy the validity of an arrest. Trupiano v. United States, 334 U.S. 699, 68 S.Ct. 1229, 92 L.Ed. 1663 (1948), United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950).

We recognize that the Supreme Court of the United States in the majority opinion written in Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), in an attempt to refute Justice White's dissent therein did discuss as obiter dicta, the necessity for warrants in general both in the case of arrests and in the case of search and seizure. However, in *Coolidge*, there was no question as to the validity of the arrest of defendant in his home on the charge of murder, but rather the case turned upon whether there had been a lawful search and seizure of petitioner's automobile since the warrant for the search and seizure of his automobile did not satisfy the require-

ments of the Fourth Amendment—whether a warrantless search was justifiable under the given circumstances of the case. That court explicated that the basic constitutional rule is that "searches conducted outside the judicial process, without prior approval by judges or magistrates, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions [citing Katz v. United States, 389 U.S. 347, at 357, 88 S.Ct. 507, 19 L.Ed.2d 576]. The exceptions are 'jealously and carefully drawn' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.'" Considering the three theories proposed by the state to bring the search of the automobile within one or another of the exceptions to the warrant requirement, the court discounted all three theories and found that the seizure of the car in the driveway could not be justified as incidental to the arrest which took place inside the house, that the argument of the state to the effect that police may make a warrantless search of an automobile whenever they have probable cause to do so was without merit since the police for some time had known of the probable role of the car, the petitioner had had ample time to destroy incriminating evidence, the house was guarded, and petitioner had no access to the car—hence, there were no exigent circumstances justifying a warrantless search. As to the third theory of the state that the car itself was an instrumentality of the crime and as such might be seized because it was in plain view, the court responded that under the circumstances present in *Coolidge,* the plain view exception could not justify the seizure of defendant's automobile. With regard to this position by the state, the court explicated, inter alia,

"The police had ample opportunity to obtain a valid warrant; they knew the automobile's exact description and location well in advance; they intended to seize it when they came upon Coolidge's property. And this is not a case involving contraband or stolen goods or objects dangerous in themselves."

Subsequent to deciding the issue before it as above explained, the majority in an attempt to refute Justice White's dissent went into a lengthy discourse on warrants in general. It is in this section of the opinion that the court discussed warrantless arrests. Justice Harlan points out in his concurring opinion that the court again leaves open the issue of a warrantless entry into a man's home to arrest him on probable cause.

The Supreme Court posited a question similar to the one before us in the following language, at 480, 91 S.Ct. at 2045,

"Indeed, if Mr. *Justice White* is correct that it has generally been assumed that the Fourth Amendment is not violated by the warrantless entry of a man's house for purposes of arrest, it might be wise to re-examine the assumption. Such a re-examination 'would confront us with a grave constitutional question, namely, whether the *forceful* nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment.' Jones v. United States, 357 U.S., at 499-500, 78 S.Ct. [1253], at 1257 [2 L.Ed.2d 1514].' (Emphasis supplied.)

and replied to this proposition as follows,

> "None of the cases cited by Mr. *Justice White* disposes of this 'grave constitutional question.' The case of Warden v. Hayden [387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782], supra, where the Court elaborated a 'hot pursuit' justification for the police entry into the defendant's house without a warrant for his arrest, certainly stands by negative implication for the proposition that an arrest warrant is required in the absence of exigent circumstances. . . . *But we find it unnecessary to decide the question in this case.* The rule that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions,' [Katz v. United States, supra] is not so frail that its continuing vitality depends on the fate of a supposed doctrine of warrantless arrest." (Emphasis supplied.) at pp. 480-481, 91 S.Ct. at pp. 2045-2046.

We will not extend the application of *Coolidge* beyond its actual holding, and we are by no means persuaded that the position we took in *Falcon*, and the reasoning upon which it was based, are no longer valid.

The District Court of Appeal erred in reversing respondent's conviction and discharging respondent on the ground that the arresting officers had ample time to obtain an arrest warrant and erred in qualifying the language of the statute to exclude arrests in dwelling houses in the nighttime. There is no such exception set out in the statute. The

arrest of respondent was lawful pursuant to Section 901.15 (3), Florida Statute, F.S.A. Furthermore, as reflected by the testimony, after respondent was arrested, he invited the officers into his private dwelling and the lottery tickets sought to be suppressed by respondent were in plain view on the dining room table.

Accordingly, the decision of the District Court is quashed and the cause remanded to that court with instructions to reinstate the Order of the Circuit Court affirming the judgment of conviction and sentence of one year imposed by the Criminal Court of Record.

It is so ordered.

CARLTON, C.J., and BOYD, MCCAIN and DEKLE, JJ., concur.

Opinion of the District Court of Appeal of Florida, Second District

DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

No. 71-191

Sept. 15, 1972

Rehearing Denied Oct. 17, 1972

PEDRO ANTONIO PEREZ,

Petitioner,

—v.—

STATE OF FLORIDA,

Respondent.

MANN, Judge.

At least six Tampa police officers waited outside Perez' home one night until the lights went out and then, nearly midnight, went to his door, knocked on it and placed him under arrest for receiving stolen property. The question we must determine is whether an officer who has known for two or three days of the circumstances on which he intends to arrest a citizen, but who fails to get an arrest or search warrant, was lawfully in that citizen's home when he saw the lottery tickets which grounded this second charge. If the entry into the home was unlawful, under the doctrine of Wong Sun v. United States, 1963, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441, the tainted evidence should have been suppressed.

Our Supreme Court intimated in Falcon v. State, Fla. 1969, 226 So.2d 399, that the statutory requirements[1] are all that govern the propriety of an arrest. But the Court did not have before it a case like this one, and if the arrest in this case constituted, as we hold it did, an unreasonable seizure of Perez' person, the Constitutional command clearly takes precedence over the statute. The precise question has never been settled by the Supreme Court of the United States. In Vale v. Louisiana, 1970, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409, Mr. Chief Justice Burger, dissenting, said, "I agree that the opportunity to obtain a warrant is one of the factors to be weighed in determining reasonableness." Id. at 40, 90 S.Ct. at 1975. We think a seizure of the person is no less subject to the reasonableness test of the Fourth Amendment[2] than the seizure of a thing.

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[1] Fla. Stat. § 901.15, F.S.A.

A peace officer may without warrant arrest a person:

(1) When the person to be arrested has committed a felony or misdemeanor in his presence. In the case of such arrest for a misdemeanor, the arrest shall be made immediately or on fresh pursuit.

(2) When a felony has in fact been committed, and he has reasonable ground to believe that the person to be arrested has committed it.

(3) When he has reasonable ground to believe that a felony has been or is being committed and reasonable ground to believe that the person to be arrested has committed or is committing it.

(4) When a warrant has been issued charging any criminal offense and has been placed in the hands of any peace officer for execution.

[2] U.S. Const. Amend. IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable

Some early English cases[3] suggest that where the King is a party an officer may enter a dwelling to serve process. We think a rule that would authorize an officer who has had probable cause to arrest for two days to wait until a citizen has retired and then enter his dwelling late at night is inappropriate in a society which has chosen to be governed by a Constitution rather than a King.

We delayed decision in this case because the central question was argued to the Supreme Court of the United States in Johnson v. Louisiana, 1972, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152. In the end, *Johnson* was resolved without reaching the question because Johnson's conviction did not rest on evidence found while the officers were in the defendant's home effecting his arrest. Perez' conviction rests on nothing else.

The Fourth Amendment to the Constitution of the United States affords citizens protection in their "persons" and "houses" against unreasonable search and seizure. We think Perez' arrest is the most unreasonable seizure of a citizen's person which has come to our attention. For the purpose of deciding the case, we credit the trial court's find-

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cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fla. Const. art. I, § 12, F.S.A.

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. Articles or information obtained in violation of this right shall not be admissible in evidence.

[3] See Annot., 5 A.L.R. 263, where the cases are collected.

ing of probable cause, but note that Perez was acquitted of the charge of receiving and concealing a stolen television set. Our decision rests upon the admitted fact that the officers had ample time to obtain a warrant. There was no showing that Perez was intending to leave. There is, in fact, evidence that the officer tried to get a warrant and was refused by the prosecutor. Certainly a number of magistrates and judges were available over at least two days for the issuance of warrants. Then there is the question of entry into a private dwelling at nighttime, a circumstance which from the earliest years of our common law was thought to be significant. It is hardly less frightening to be awakened by a policeman than a burglar.

As recently as Coolidge v. New Hampshire, 1971, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564, the Supreme Court has reemphasized the necessity for presenting evidence of probable cause to a detached magistrate whenever practicable.

We need not clutter the reports with all of the literature on the subject. A reading of *Coolidge* will lead the serious scholar to all that needs to be said. Surely there are cases in which there is reason to enter a dwelling during the nighttime to make an arrest. Dorman v. United States, 1970, 140 U.S. App. D.C. 313, 435 F.2d 385, is such a case. An armed robber who, in fleeing the premises on which the robbery occurred, left behind documents identifying him. His picture was shown to victims, who identified the robber as the man described in the documents, and an application for a warrant was begun, but no magistrate was available. Dorman was armed, dangerous, and had every reason to flee. His arrest at home was upheld. We can appreciate that. But Perez' case is different. His very acquittal of the felony charge on which the officers entered his home sug-

gests why a neutral and detached magistrate should, in the absence of exigent circumstances, authorize the invasion of an American citizen's home. We simply cannot accept the blanket assertion that probable cause to arrest a person for felony justifies intrusion into his home during the nighttime two or three days after the probable cause arose, at least one day after a warrant was sought unsuccessfully, and in the absence of any single fact showing need for action before the facts could be submitted to a magistrate. If the Fourth Amendment means anything, it must protect citizens against the sort of intrusion shown here. Should our Supreme Court review this case, we would hope that their expression in *Falcon* would be limited to exclude arrests in dwelling houses in the nighttime.

The order of the Circuit Court affirming the judgment of the Criminal Court of Record is quashed and the cause remanded with directions to discharge petitioner.

PIERCE, C.J., and HOBSON, J., concur.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-220

PEDRO PEREZ,

Petitioner,

against

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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OPINIONS BELOW

The opinion of the Supreme Court of Florida, entered on May 16, 1973, is reported at 277 So.2d 778. The opinion of the District Court of Appeal of Florida, Second District, is reported at 267 So.2d 33.

JURISDICTION

Respondent has no quarrel with the jurisdiction of this Court pursuant to Title 28, United States Code, § 1257(3) or under any other provision, at least for purposes of determining whether to decline assumption thereof.

QUESTION PRESENTED

WHETHER A FELONY ARREST UPON PROBABLE CAUSE AND CONSEQUENT SEIZURE OF EVIDENCE ARE UNLAWFUL BECAUSE MADE IN THE ARRESTED PERSON'S HOME IN THE MIDDLE OF THE NIGHT, WITHOUT A WARRANT, ALTHOUGH THE ARRESTING OFFICERS HAD AMPLE TIME TO OBTAIN A WARRANT.

The decision of the Supreme Court of Florida on this point was in the negative.

STATEMENT OF THE FACTS

The facts are sufficiently set forth in the opinion of the Supreme Court of Florida reported at 277 So.2d 778 and will not be repeated here.

ARGUMENT

Petitioner seeks to sustain the narrow premise that his warrantless arrest at his home in the nighttime was unlawful simply because the arresting officers had sufficient time within which to procure an arrest warrant. Initially, it is emphasized that the Florida District Court of Appeal, Second District, credited the trial court's finding of probable cause, *Perez v. State*, 256 So.2d 33, 35 (Fla. App. 2 1972), but reversed petitioner's conviction upon the admitted fact that the officers had ample time to obtain a warrant and also for the following reason:

> "We simply cannot accept the blanket assertion that probable cause to arrest a person for felony justifies intrusion into his home during the nighttime two or three days after the probable cause arose, at least one day after a warrant was sought unsuccessfully, and in the absence of any single fact showing need for action before the facts could be submitted to a magistrate. If the Fourth Amendment means anything, it must protect citizens against the sort of intrusion shown here. Should our Supreme Court review this case, we would hope that their expression in Falcon would be limited to exclude arrests in dwelling houses in the nighttime." *Id.* at 36.

Section 901.15, Florida Statutes, 1971, provides in pertinent part as follows:

"901.15 A peace officer may arrest a person without a warrant when:

"(3) He reasonably believes that a felony has been or is being committed and reasonably believes that the person to be arrested has committed or is committing it."

Please note, the above statute does not say that the arrest thereby authorized cannot be made in the arrested person's home in the nighttime without a warrant if the arresting officer had ample opportunity to obtain a warrant. The irrefutable truth is that there is no verbiage in the above quoted statute or any other Florida statute that forbids the making of an arrest authorized by Section 901.15 (3) in the middle of the night without a warrant if the arresting officer has ample opportunity to obtain a warrant. Interestingly enough, the decision of the Florida Second District Court of Appeal reversing petitioner's conviction was bottomed on this precise fact: "Our decision rests upon the admitted fact that the officers had ample time to obtain a warrant." *Id.* at 35.

The decisional law of this jurisdiction on this point is clear: The absence of an arrest warrant does not necessarily invalidate an arrest based on reasonable grounds to believe that a felony has been committed even though there may have been sufficient time to have obtained an arrest warrant. *Falcon v. State*, 226 So.2d 399 (Fla. 1969);

and *Reis v. State*, 248 So.2d 666 (Fla.App. 3 1971). Thus, by imposing additional re-requirements for the lawful arrest on probable cause to those set out in Chapter 901, Florida Statutes, 1971, the decision of the Florida Second District Court of Appeal was not only contrary to the decisional law of this state but also flies in the teeth of settled principles of Fourth Amendment law long adhered to by this Court.

In *Trupiano v. United States*, 334 U.S. 699, 92 L.Ed. 1663 (1948), respondent relied upon the well-established right of law enforcement officers to arrest without a warrant for a felony committed in their presence and this notwithstanding the fact that there may have been adequate time to procure a warrant of arrest. This Court after pointing out that there was more than adequate probable cause sustained this contention as follows:

> "The absence of a warrant of arrest, even though there was sufficient time to obtain one, does not destroy the validity of an arrest under these circumstances." 92 L.Ed. at 1669.

In *United States v. Rabinowitz*, 339 U. S. 56, 94 L.Ed. 653 (1950), this Court expressly reaffirmed its decision in *Trupiano* relative to the warrantless arrest of a person where there was time to secure a warrant of arrest. However, the rationale of *Trupiano* on the search warrant issue was overruled. Note the following:

"It is appropriate to note that the Constitution does not say that the right of the people to be secure in their persons should not be violated without a search warrant if it is practicable for the officers to procure one. The mandate of the Fourth Amendment is that the people shall be secure against *unreasonable* searches. It is not disputed that there may be reasonable searches, incident to an arrest, without a search warrant. Upon acceptance of this established rule that some authority to search follows from lawfully taking the person into custody, it becomes apparent that such searches turn upon the reasonableness under all the circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required. To the extent that Trupiano v. United States, 334 US 699, 92 L. ed 1663, 68 S.Ct. 1229, requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled. The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances--the total atmos-

> phere of the case. It is a sufficient precaution that law officers must justify their conduct before courts which have always been and must be, jealous of the individual's right of privacy within the broad sweep of the Fourth Amendment." (Emphasis theirs.)

Similarly, respondent contends that the relevant test as to the validity of an arrest is not whether it was reasonable to procure an arrest warrant, but whether the arrest was reasonable. The Fifth Circuit Court of Appeals has consistently adhered to the principle set forth by this Court in *Trupiano* and *Rabinowitz*. See *Odom v. United States*, 403 F.2d 45 (5th Cir. 1968); *Dailey v. United States*, 261 F.2d 870 (5th Cir. 1958), cert. denied 359 U.S. 969; *United States v. Holiday*, 319 F.2d 775 (2nd Cir. 1963); and *Abramson v. United States*, 326 F.2d 565 (5th Cir. 1964).

Petitioner seeks comfort from this Court's decision in *Jones v. United States*, 357 U.S. 493, 2 L.Ed.2d 1514, 78 S. Ct. 1253 (1958). Respondent submits, however, that the decision in *Jones* invalidating the search as not being incident to a lawful arrest turned on the fact that the testimony of the officers made it clear that their purpose in entering petitioner's home was to search for distilling equipment and not to arrest him. Thus, the facts in *Jones* are readily distinguishable from those in the case *sub judice*.

The Florida Second District Court of Appeal, in reversing petitioner's conviction, relied on *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971), remarking that a "reading of *Coolidge* will lead the serious scholar to all that needs to be said." 267 So.2d at 36. It is submitted, however, that even *serious scholars* may disagree as to the scope of this Court's holding in *Coolidge*. Respondent recognizes that in *Coolidge* this Court did discuss as *obiter dicta* the necessity for warrants in general both in the case of arrests and in the case of search and seizure. Respondent lays no claim to being a serious scholar but as we read *Coolidge*, there was no question as to the validity of the arrest of petitioner in his home on the charge of murder. Rather, the case turned upon whether there had been a lawful search and seizure of petitioner's automobile since the warrant for the search and seizure of said automobile did not satisfy Fourth Amendment requirements. In considering the three theories proposed by the state to bring the search of the automobile within one or another of the exceptions to the warrant requirement, this Court discounted all three theories and found that the seizure of the car in the driveway could not be justified as incidental to the arrest which took place inside the house. The argument of the state that police may make a warrantless search of an automobile whenever they have probable cause to do so was rejected since there were no exigent circumstances justifying the warrantless search. And the argument that

the car itself was an instrumentality of the crime and might be seized because it was in plain view was rejected. This Court pointedly remarked that the plain view exception could not justify the seizure of petitioner's automobile under the existing circumstances present in *Coolidge*. We quote:

> "The police had ample opportunity to obtain a valid warrant; they knew the automobile's exact description and location well in advance; they intended to seize it when they came upon Coolidge's property. And this is not a case involving contraband or stolen goods or objects dangerous in themselves." 29 L.Ed.2d at 586.

Thereafter, the majority in commenting on Justice White's dissent went into a lengthy discourse on warrants in general. It is in this section of the opinion that warrantless arrests are discussed. Justice Harlan pointed out in his concurring opinion that the issue of a warrantless entry into a man's home to arrest him on probable cause was left open. Again respondent relies on the corollary to the *Rabinowitz* rule that the relevant test as to the validity of an arrest is not whether it was reasonable to procure an arrest warrant, but whether the arrest was reasonable. It is submitted that if the arrest is supported by probable cause sufficient to meet Fourth Amendment standards, then an arrest is reasonable no matter how long the officer may have enter-

tained such probable cause.

Finally, the following salient facts should be kept in mind:

"Accompanied by several other police officers, Detective Napoli went to the house of respondent Perez shortly after midnight the night of March 22, 1967. He was prompted to go there by information to the effect that respondent had stolen property that came from a burglary Napoli was investigating, a 23-inch RCA color television. This information was received some two or three days previously from a confidential informer who Napoli had known for several years and who had on previous occasions given very reliable information. Napoli did not obtain an arrest warrant or a search warrant before going to respondent's house. The officers knocked on the door and identified themselves to respondent and immediately arrested respondent on probable cause telling him he was being arrested for possession of stolen property, to-wit: the RCA television which Napoli could visibly see from the front porch when respondent opened the door.

"After having invited the officers into his house, respondent turned on the lights in the living room and dining room. While one of the officers read respondent his constitutional rights, Napoli along

> with several officers, saw bolita and gambling paraphernalia on the dining room table which was located approximately five feet from the television." 277 So.2d at 779, 780.

The above facts speak for themselves. There was no forced entry. There was no ransacking of petitioner's home under the guise of being incidental to a lawful arrest. The contraband (bolita and gambling paraphernalia) was seen by the officers in plain view on the table approximately five feet from the television. It is submitted that the discovery of this contraband comes within the plain view doctrine as explicated by this Court in *Coolidge*.

CONCLUSION

The decision of the Florida Supreme Court which petitioner now seeks to have this Court review is in harmony with the prior decisions of this Court delineating rights guaranteed by the Fourth Amendment to the United States Constitution. Consequently, this Court should deny the petition for writ of certiorari.

Dated: November 9, 1973.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General of the
State of Florida
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Petition for Writ of Certiorari has been forwarded via U. S. Mail to W. De Hart Ayala, Jr., Suite 405 Legal Center, 725 East Kennedy Boulevard, Tampa, Florida 33602, and Melvin L. Wulf and Burt Neuborne, American Civil Liberties Union Foundation, 22 East 40th Street, New York, New York 10016, attorneys for petitioner, this 9th day of November 1973.

WALLACE E. ALLBRITTON
Assistant Attorney General

of Counsel